SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 507.

THE UNITED STATES, PETITIONER,

vs.

WILLIAM OPENHYM & SONS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received Jun. 2, 1915.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS ET AL., APPELLEES. } No. 1394.

Transcript of record on appeal from the Board of United States General Appraisers.

William L. Wemple, Assistant Attorney General, attorney for appellant.

Filed May 28, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

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1 *Petition.*

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
WILLIAM OPENHYM & SONS AND A. WIMPFheimer & Bro., appellees. } No. 1394. Original.

To the honorable the United States Court of Customs Appeals:

Your petitioner being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied are set forth in the annexed assignment of errors.

Dated New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner,
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.
3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this
2 proceeding with such other data as are convenient for purposes of identification. Decided March 6, 1914. Port of New York.

Protest No.	Vessel.	Entered.	Entry No.
	William Openhym & Sons.		
726895/34879	New York	Oct. 7, 1913	277432
	A. Wimpfheimer & Bro.		
726912/34878	New York	Oct. 7, 1913	278308

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS AND A. WIMPFHEIMER & BRO., appellees. } No. 1394.

SIR: Please take notice that we appear for the appelle in this proceeding and demand that a copy of all papers herein be served upon us at our office, No. 32 Broadway, New York City.

Yours, &c.,

CURIE, SMITH & MAXWELL,
Attorneys for said Appellee.

Dated New York, May 7, 1914.

To William L. Wemple, Esq., Asst. Attorney General, and attorney for United States.

To clerk of U. S. Court of Customs Appeals.

Endorsed: United States Court of Customs Appeals. Filed May 8, 1914. Arthur B. Shelton, clerk.

3 *Return of the board.*

United States of America, Board of United States General Appraisers, New York, ss.

United States, appellant, vs. William Openhym & Sons and A. Wimpfheimer & Bro., appellees. Board's protest No. 726895, etc. Collector's No. 34879, etc. Suit No. 1394.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and

fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the fifth day of May, 1914, required the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protest 726895–34879 of William Openhym & Sons, with the report of the collector of customs thereon;
2. Stipulation of counsel;
3. Protest 726912–34878 of A. Wimpfheimer & Bro., with the report of the collector of customs thereon;
4. Stipulation of counsel.
5. Copy of the decision of the board, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 15th day of May, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount.

Protest 726895/34879.

NEW YORK, *December 8, 1913.*

COLLECTOR OF CUSTOMS, *New York.*

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on certain merchandise covered by the entries mentioned in the annexed Schedule A, which is hereby made a part hereof, claiming—

1. That said merchandise is entitled to a discount of 5 per centum of all duties charged or exacted by you or imposed thereon by the tariff act of October 3, 1913. Said discount accrues under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, for the reason that said merchandise was imported in a vessel or vessels admitted to registration under the laws of the United States.
2. In the alternative, that the effect of subsection 7 of paragraph J of Section IV is (a) to reduce the amount of duty by 5 per centum of the total amount charged, or exacted by you, or imposed by the paragraphs of said tariff act, or (b) to reduce said amount of duty by 5 per centum of the value of said merchandise.
3. That the merchandise is not dutiable at the rate or rates charged by you, and that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

We give notice that we pay all other rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods; that we hereby reserve all questions of law and fact, and are prepared to substantiate by proof every allegation of fact contained in the within protest. We claim the right of reasonable notice of the time and place when an opportunity will be afforded us to furnish such proof.

The references to statutes and other data herein given are for your convenience and are not to be taken as restricting this protest or relieving you from the duty of taking cognizance of all laws affecting said merchandise, whether cited herein or not.

5 Schedule A.

Vessel, New York. Nationality of vessel, United States. Date of entry, Oct. 7/13. Entry No. 277432. If warehouse W. H. Bond, c. Date of liquidation, Nov. 11/13. Marks and numbers of packages as per invoices and entries.

WILLIAM OPENHYM & SONS,
CURIE, SMITH & MAXWELL,
Attorneys, 32 Broadway, N. Y.

Endorsed: Customhouse, New York. Received, Dec. 10, 1913.

Report of the collector.

DEC. 17, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

In the matter of protest 726895/34879 of William Openhym & Sons, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants, that the merchandise covered by the protest above mentioned consists of veiling manufactured in France, imported by the S. S. New York of the American Line, entered at the port of New York on or about October 7, 1913, and covered by entry 277432; that said vessel is and was at the time of such importation admitted to registration under the laws of the United States, and that in liquidating the duties upon said

6 merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

It is also stipulated that like merchandise, the product of the soil and industry of France, is imported into the United States in ships of France, and that products of various countries with which the United States has most-favored-nation treaties are imported into the United States in the ships of such countries.

It is further stipulated that the above-mentioned protest may be deemed submitted upon the record and the foregoing stipulation as to the facts; such reasonable time for briefs as may be allowed by the board being reserved to both parties.

Dated, December 29, 1913.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.
CURIE, SMITH & MAXWELL,
Attorneys for the Importers.

Protest 726912/34878.

NEW YORK, *December 9, 1913.*

COLLECTOR OF CUSTOMS, *New York.*

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on certain merchandise covered by the entries mentioned in the annexed Schedule A, which is hereby made a part hereof, claiming—

1. That said merchandise is entitled to a discount of 5 per centum of all duties charged or exacted by you or imposed thereon by the tariff act of October 3, 1913. Said discount accrues under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, for the reason that said merchandise was imported in a vessel or vessels admitted to registration under the laws of the United States.

2. In the alternative, that the effect of subsection 7 of paragraph J of Section IV is (a) to reduce the amount of duty by
7 5 per centum of the total amount charged or exacted by you, or imposed by the paragraphs of said tariff act, or (b) to reduce said amount of duty by 5 per centum of the value of said merchandise.

3. That the merchandise is not dutiable at the rate or rates charged by you, and that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

We give notice that we pay all other rates than is claimed above as the legal rate under compulsion to obtain possession of our goods; that we hereby reserve all questions of law and fact, and are prepared to substantiate by proof every allegation of fact contained in the

within protest. We claim the right of reasonable notice of the time and place when an opportunity will be afforded us to furnish such proof.

The references to statutes and other data herein given are for your convenience and are not to be taken as restricting this protest or relieving you from the duty of taking cognizance of all laws affecting said merchandise, whether cited herein or not.

Schedule A.

Vessel, New York. Nationality of vessel, United States. Date of entry, Oct. 7/13. Entry No. 278308. If warehouse W. H. Bond, 79891. Date of liquidation, Nov. 24/13. Marks and numbers of packages, as per invoices and entries.

A. WIMPFHEIMER & BRO.,
CURIE, SMITH & MAXWELL,
Attorneys, 32 Broadway, N. Y.

Endorsed: Custom house, New York. Received, Dec. 10, 1913.

Report of the collector.

DEC. 17, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

8 Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

In the matter of protest 726912/34878 of A. Wimpfheimer & Brother, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants that the merchandise covered by the protest above mentioned consists of cotton velvets manufactured in England, imported by the S. S. New York, of the American Line, entered at the port of New York on or about October 7, 1913, and covered by entry 278308; that said vessel is and was at the time of such importation admitted to registration under the laws of the United States, and that in liquidating the duties upon said merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

11 "The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

12 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that

these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems
13 to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being, in our judgment, no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 33, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different
14 persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, inour opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

15 "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope

of it and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises
16 over the importation of goods in other than American vessels.

It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France or Germany or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial
17 treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be

so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America;
18 and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clause which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held

that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals
19 has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force,
20 and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Consti-

tution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith,
21 which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"It is a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country.

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between

such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

22 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractural provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the

23 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition
24 which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can by a treaty previously entered into in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between
25 the two nations, the courts would be unable to grant relief

under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

26 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354 et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general

rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular
27 country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.
28 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof. As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by

this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protests 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

29 BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Protest.	Importer.
726895/34879	William Openhym & Sons.
726912/34878	A. Wimpfheimer & Bro.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

30 United States Court of Customs Appeals.

THE UNITED STATES
v.
WILLIAM OPENHYM & SONS AND A. WIMPFHEIMER & BRO. } No. 1394.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1394, The United States v.

William Openhym & Sons and A. Wimpfheimer & Bro.," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals, Arthur B. Shelton, clerk.

81 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. | No. 1394.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

82 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,
v.
The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,
v.
The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,

v.

The United States, appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

34 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. } No. 1394.

For the opinion of the court in the above-entitled appeals see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

35 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. } No. 1394.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON, *Clerk.*

36 United States of America, ss.

The President of the United States of America to the honorable the Judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and William Openhym & Sons et al. are appellees, No. 1394, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein

should be certified by the said Court of Customs Appeals and
37 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

38 (Indorsed:) File No. 24,788. Supreme Court of the United States, No. 1044, October term, 1914. The United States vs. William Openhym & Sons et al. Writ of certiorari.

39 In the Supreme court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
WILLIAM OPENHYM & SONS ET AL. } No. 1044.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
THOMAS M. LANE,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

40 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. William Openhym & Sons et all., No. 1394, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the Clerk Supreme Court U. S. Received Jun. 29, 1915.

41 (Indorsed:) File No. 24, 788. Supreme Court U. S., October term, 1915. Term No. 507. The United States, petitioner, vs. William Openhym & Sons et al. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,788. U. S. Court of Customs Appeals. Term No. 507. The United States, petitioner, vs. William Openhym & Sons et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,788.